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IN THE

Supreme Court of the United States

No. 1048

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Respondent,

against

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Petitioners,

and

TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Respondents.

BRIEF FOR RESPONDENT, THE MANUFACTURERS LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NICHOLAS CONOVER ENGLISH,
Counsel for Respondent, The Manufacturers Life Insurance Company.
11 Commerce Street,
Newark 2, New Jersey.

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Counter-Statement of Questions Presented for Review

Did the United States Court of Appeals for the Third Circuit properly affirm the interlocutory judgment of interpleader entered in the District Court, where:

(a) There was diversity of citizenship among the various claimants to a fund of $25,000;

(b) One of the claimants had instituted an action against plaintiff in the Supreme Court of New York and had attached funds of the plaintiff on deposit in a New York bank; and

(c) All the defendants had been personally served with process.

Counter-Statement of the Case

Defendants Klepper and Schnur have petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals in the Third Circuit dated April 25, 1958, which affirmed the interlocutory judgment of interpleader entered by the United States District Court for the District of New Jersey on December 9, 1957.

The essential facts are stated in the complaint in interpleader, which petitioners did not print, but which is included in the appendix to this answer (Appendix A).

Briefly summarized, the facts are that the plaintiff insurance company issued a life insurance policy in the face amount of $25,000 on the life of one Menander T. Constant, who died on September 27, 1957. His wife, who is the defendant Marie M. Constant, was originally designated beneficiary. Prior to his death, the insured appointed the defendant Edward Schnur as beneficiary, and the insured and his wife executed a written assignment of the policy to the defendant Klepper. On the same day that the assignment of the policy was executed, Klepper wrote a letter to the insured acknowledging that he held the policy as assignee in escrow until the repayment in full of a first mortgage and a second mortgage. The defendant Schnur is the first mortgagee. The defendant Tanner Associates, Inc. is the assignee of the second mortgage.

Following the death of the insured, each of the defendants herein named made claim to the plaintiff insurance company for the whole or a part of the proceeds of the policy.

The plaintiff company is admitted to do business in New Jersey, but not in the State of New York. The policy in question was issued by plaintiff to a New Jersey resi-

dent. It was stated during the oral argument before the District Court that the mortgages, to secure which the policy was assigned, were executed by a New Jersey corporation largely owned by the insured. The real controversy lies between the defendant Schnur, the first mortgagee, and the defendant Klepper, the assignee of the policy, on the one hand, and the defendant Tanner Associates, Inc., the second mortgagee, on the other, with regard to their respective rights to the security afforded by the proceeds of the life insurance policy.

Defendant Klepper brought suit against the plaintiff insurance company in the New York Supreme Court to recover the proceeds of said life insurance policy. Inasmuch as plaintiff is not amenable to personal service in the State of New York, since it does not do business there, Klepper attached a bank account of the plaintiff in the First National City Bank of New York.

In order to protect itself against the competing claims, the plaintiff thereupon instituted the present action of interpleader in the United States District Court for the District of New Jersey, in accordance with 28 U.S.C. §1335, and deposited therein the proceeds of the policy amounting to $25,000. Two of the defendants, Klepper and Schnur, reside in New York; defendant, Marie M. Constant, is a citizen and resident of New Jersey, and defendant, Tanner Associates, Inc., is a New Jersey corporation.

Upon the filing of the complaint and the deposit of the fund of $25,000 into the Registry of the District Court, Judge WORTENDYKE entered the usual order to show cause, upon the return of which was entered the interlocutory judgment of interpleader, which is printed *infra* (Appendix B).

The defendants Klepper and Schnur appealed from the interlocutory judgment of interpleader to the United States

Court of Appeals for the Third Circuit. The argument of said appeal took place on April 25, 1958. At the conclusion of the appellants' argument, and without calling upon counsel for the appellees, the Court of Appeals immediately announced its affirmance of the order under appeal. This is the decision which the petitioners would now ask this Court to review.

ARGUMENT

POINT I

The judgments below were properly in accord with 28 U. S. C. §1335.

Before this Court, petitioners do not challenge the proposition that the plaintiff insurance company was, under the facts and circumstances here presented, entitled to the remedy of interpleader. Rather, their whole contention, as we understand it, is that the insurance company is required by the Federal Constitution to have sought such remedy by way of a counterclaim in interpleader in the action which Klepper had brought against it in the Supreme Court of New York, Kings County. Such contention is without merit for three reasons:

1. The U. S. District Court unquestionably had jurisdiction under 28 U.S.C. §1335, which is the Federal Interpleader Act.

2. At the time the instant Federal interpleader action was instituted:

   (a) no interpleader action was pending in the New York Supreme Court;

   (b) nor were defendants Schnur, Constant or Tanner Associates, Inc. before the New York

Supreme Court or named as parties in the proceeding therein pending.

3. The attachment by Klepper of the funds of the insurance company on deposit in a New York bank did not prevent the U. S. District Court in New Jersey from exercising its jurisdiction under the Interpleader Act.

It should be observed that the only parties to the proceeding in the New York Supreme Court are Klepper and the insurance company. It should also be noted that no counterclaim in interpleader has as yet been filed by the insurance company in the New York Supreme Court action, so that none of the other three claimants to the fund is presently before the New York Supreme Court.

Petitioners do not and can not dispute the proposition that the facts here fall squarely within the provisions of the Federal Interpleader Act, 28 U.S.C., §1335, and that the courts have held that where a stakeholder shows such facts, his right to the remedy of interpleader is not discretionary with the court but is absolute.

Railway Express Agency v. *Jones*, 106 Fed. 2d 341 (7 Cir. 1939);

American-Hawaiian S.S. Co. v. *Bowring & Co.*, 150 Fed. Supp. 449, 453 (S. D. N. Y. 1957).

In the *Jones* case, the court held at 106 Fed. 2d 344:

"The mandatory requirements of the statute are:

(a) Two or more adverse claimants; (b) citizens of different states; (c) a fund in possession of party seeking to interplead, to which the two or more adverse claimants are making claim; (d) said sum exceeds $500.

"All these essential facts were disclosed in the bill of interpleader.

* * *

"Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section is absolute."

Since the United States District Court for the District of New Jersey had jurisdiction over the pending controversy, it was its duty to exercise it, even though (although we do not so concede) the New York Supreme Court might also have had jurisdiction to entertain the same action.

In *Hyde* v. *Stone*, 61 U. S. 170 (1857), CAMPBELL, *J.* said for the court at page 175:

"But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. * * * But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. (*Suydam* v. *Broadnax*, 14 Pet., 67; *Union Bank* v. *Jolly, Adm'r*, 18 How., 503.)"

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19 (1909), the court stated at page 49:

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404, * * *. The right of a party plaintiff to choose

a Federal court where there is a choice cannot be properly denied. *In re Metropolitan Railway Receivership*, 208 U. S. 90-110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210."

In *McClellan* v. *Carland*, 217 U. S. 268 (1910), the court held at page 281:

> "* * * It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County* v. *Sherwood*, 148 U. S. 529, 534."

and at page 282:

> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different States the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

In *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), Chief Justice Stone stated for the court at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts."

In *Ermentrout* v. *Commonwealth Oil Co.*, 220 Fed. 2d 527 (5th Cir. 1955), the court held at page 530:

> "The rule is well established that when action is in personam and involves a question of personal liability only, another action for the same cause in another jurisdiction is not precluded. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077; *McClellan* v. *Carland*, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762; *Byrd-Frost, Inc.* v. *Elder*, 5 Cir., 93 F. 2d 30, 115 A. L. R. 342. Therefore the pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction. *McClellan* v. *Carland*, *supra*; *Kline* v. *Burke Construction Company*, *supra*; *Byrd-Frost, Inc.* v. *Elder*, *supra*; *Aetna Life Insurance Company of Hartford* v. *Martin*, 8 Cir., 108 F. 2d 824."

Other cases to the same effect are:

Stanton v. *Embrey*, 93 U. S. 548 (1876);

Chicot County v. *Sherwood*, 148 U. S. 529, 534 (1893);

Kline v. *Burke Construction Co.*, 260 U. S. 226 (1922);

Commonwealth Co. v. *Bradford*, 297 U. S. 613 (1936);

Butler v. *Judge of U. S. District Court*, 116 Fed. 2d 1013, 1015 (9 Cir. 1941);

Parcell v. *Summers*, 126 Fed. 2d 390 (4 Cir. 1942); cert. den. 317 U. S. 640;

U. S. v. *1 Dozen Bottles*, 146 Fed. 2d 361, 363 (4 Cir. 1944);

In re President & Fellows of Harvard College, 149 Fed. 2d 69 (1 Cir. 1945);
Chicago, G. W. Ry. Co. v. *Beecher*, 150 Fed. 2d 394, 398 (8 Cir. 1945); cert. den. 326 U. S. 781;
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Hinsdale etc. Co. v. *Norfolk etc. Co.*, 101 Fed. Supp. 19 (D. Mass. 1951);
Rosenblum v. *Trullinger*, 118 Fed. Supp. 394, 397 (E. D. Ark. 1954);
Lyons v. *Sanders*, 120 Fed. Supp. 392, 395 (W. D. Ky. 1954).

The rule of the foregoing cases is fully applicable here because interpleader, at least in its initial stages, as between the stakeholder and the claimants, is regarded as a proceeding *in personam* rather than one *in rem*.

N. Y. Life Ins. Co. v. *Dunlevy*, 241 U. S. 518 (1916);
Aetna Life Ins. Co. v. *De Roure*, 123 Fed. Supp. 736, 740 (S. D. N. Y. 1954);
U. S. v. *Coumantaros*, 146 Fed. Supp. 51 (S. D. N. Y. 1956);
Cross v. *Armstrong*, 44 Ohio St. 613, 10 N. E. 160, 165 (1887);
Washington Life Ins. Co. v. *Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123 (1898);
Expressmen's Ass'n v. *Hurlock*, 91 Md. 585, 46 Atl. 957 (1900);
Hanna v. *Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921);
Rutherford v. *Union Land & Cattle Co.*, 47 Nev. 21, 213 Pac. 1045 (1923);

John Weis Inc. v. *Reed*, 22 Tenn. App. 90, 118 S. W. 2d 677 (1938).

See also:

In re Howard, 76 U. S. (9 Wall.) 175, 184 (1869);
Austin v. *Royal League*, 316 Ill. 188, 147 N. E. 106, 109 (1925).

Moreover, it has been specifically held that the issuance of a writ of attachment by one claimant against the funds of the stakeholder on deposit in a bank, does not bar the stakeholder from bringing an interpleader proceeding and securing an injunction of the attachment action.

Sanders v. *Fertilizer Works*, 292 U. S. 190, 199 (1934);
National Fire Ins. Co. v. *Sanders*, 38 Fed. 2d 212 (5 Cir. 1930);
Cramer v. *Phoenix Mutual Life Ins. Co.*, 91 Fed. 2d 141 (8 Cir. 1937); cert. den. 302 U. S. 739;
Loew's Inc. v. *Hoyt Management Corp.*, 83 Fed. Supp. 863 (S. D. N. Y. 1949);
National Fire Ins. Co. v. *Chambers*, 53 N. J. Eq. 468, 471, 32 Atl. 663 (Pitney, V. C. 1895).

The jurisdiction of a Federal court in interpleader may properly be exercised even though proceedings looking to the resolution of the same issues are already pending in the State courts.

Maryland Casualty Co. v. *Glassell-Taylor & Robinson*, 156 Fed. 2d 519 (5 Cir. 1946);
Austin v. *Texas-Ohio Gas Co.*, 218 Fed. 2d 739 (5 Cir. 1955);
O'Daniel v. *Porter*, 240 Fed. 2d 636 (App. D. C. 1957).

POINT II

No constitutional issue is properly presented to this Court.

In invoking the jurisdiction of this Court, the petitioners say at page 2 of their petition:

> "The Circuit Court has in effect decided that the interpleader compact between the State of New Jersey and New York is unconstitutional under the 14th Amendment of the United States Constitution * * *."

This argument was not advanced by the petitioners before the District Court, nor referred to in any way in their briefs before the United States Court of Appeals for the Third Circuit. The constitutional validity of the interpleader compact is not even inferentially raised in these proceedings. The question here is simply whether the District Court properly exercised the jurisdiction given it by the Federal Interpleader Act, 28 U. S. C., Section 1335. In no shape or form does the present proceeding raise any issue as to the constitutional validity of any interpleader compact between New Jersey and New York.

In any event, the constitutional argument should not be considered by this Court because it was neither raised nor decided below.

Owens v. *Union Pacific R. Co.*, 319 U. S. 715, 725 (1943);
U. S. v. *Fleischmann*, 329 U. S. 349, 365 (1950);
Ullmann v. *U. S.*, 350 U. S. 422, 439 (1956); reh. den. 351 U. S. 928.

CONCLUSION

In conclusion, therefore, the respondent, The Manufacturers Life Insurance Company, respectfully submits that the decisions below were in all things correct; that the facts presented a classic case for invoking the jurisdiction of the Federal Interpleader Act; that no question respecting the validity of an interstate interpleader compact is involved in this proceeding; that no constitutional questions are properly at issue; and that the petition for certiorari is so patently without merit that it should be speedily denied.

Respectfully submitted.

NICHOLAS CONOVER ENGLISH,
Counsel for Respondent, The Manufacturers Life Insurance Company.

Appendix A

Complaint in Interpleader

(Filed—November 19, 1957)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1145-57

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff,

vs.

ALBERT BARNETT KLEPPER, EDWARD SCHNUR, TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

Plaintiff, The Manufacturers Life Insurance Company, by way of complaint says that:

1. Plaintiff is a corporation existing under the laws of Canada and is duly qualified to transact the business of life insurance in the State of New Jersey.

2. Defendant Albert Barnett Klepper, upon information and belief, is a resident and citizen of the State of New York and maintains his office at 82 Wall Street, New York City. Defendant Edward Schnur is a resident and citizen of the State of New York and resides at 5114 Beverly Road, Brooklyn, New York. Defendant Tanner Associates,

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Inc. is a New Jersey corporation and is a citizen of New Jersey having its principal office at 880 Bergen Avenue, Jersey City, New Jersey. Defendant Marie M. Constant is a citizen and resident of New Jersey and resides at 80 Lincoln Avenue, Long Branch, New Jersey.

3. This action arises under 28 U.S.C. §1335.

4. Under date of July 22, 1953 plaintiff issued its policy No. 1,254,339 in the face amount of $25,000 on the life of Menander T. Constant as insured. Defendant Marie M. Constant, wife, was designated beneficiary.

5. Under date of February 8, 1956, the insured appointed as beneficiary "Edward Schnur, residing at 5114 Beverly Road, Brooklyn, New York, as first mortgagee." The said Edward Schnur is one of the defendants herein.

6. Under date of February 8, 1956, the said insured and defendant Marie M. Constant executed a written assignment of said policy to "Albert Barnett Klepper, Attorney at Law, 82 Wall Street, New York 5, New York." Said Albert Barnett Klepper is one of the defendants herein.

7. Under date of February 8, 1956 the defendant Albert Barnett Klepper executed a letter to the insured in which he said in part:

> "I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.

Appendix A

"It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages."

8. On September 27, 1957, the insured, Menander T. Constant, died.

9. Under date of October 9, 1957, Abraham Weiner and Tillie Weiner executed an assignment to defendant Tanner Associates, Inc. of all their "right, title and interest in and to the proceeds of insurance policy No. 1,254,339 issued by The Manufacturers Life Insurance Company on the life of Menander T. Constant, to whatever extent we may be entitled thereto, which policy is now held in escrow by Albert Barnett Klepper to secure the payment of a first mortgage held by Edward Finnur on the premises on which the within assigned mortgage is a second mortgage, and to secure the payment of the bond and mortgage assigned herein; * * *."

10. Defendant Albert Barnett Klepper as assignee of such policy, acting through his attorney Andrew J. Dritsas, Esq., of 82 Wall Street, New York 5, New York, has filed a complaint in the Supreme Court of the State of New York, County of Kings, against the plaintiff seeking recovery of the proceeds of said life insurance policy. The said action is entitled "Albert Barnett Klepper, Plaintiff, against The Manufacturers Life Insurance Company, Defendant" and bears Index No. 13922, Year 1957. Inasmuch as plaintiff is not qualified to do business in the State of New York and has no agent for the service of process in the State of New York, the said Klepper has attached a bank account of the plaintiff in the First Na-

tional City Bank of New York, 55 Wall Street, New York 15, New York.

11. Defendant Tanner Associates, Inc., acting through its attorney, Eugene P. Kenny, Esq., of Jersey City, New Jersey, has demanded that plaintiff pay it the sum of $8,225.83, representing its interest in the proceeds of said policy.

12. Defendant Marie M. Constant, acting through her attorney, Nathaniel W. Franzblau, of Newark, New Jersey, has made claim to plaintiff of an interest in said policy.

13. Plaintiff herewith tenders into court the sum of $25,000, representing the proceeds payable under said policy.

14. Plaintiff is unable to determine the respective interests of the defendants in the proceeds of said policy, and has no adequate remedy at law save by resort to the equitable powers of this Court under 28 U.S.C. §1335.

WHEREFORE, plaintiff demands:

A. That this Court issue its process for all defendants.

B. That this Court enter its order restraining and enjoining defendant Albert Barnett Klepper, his agents and attorneys, from prosecuting or otherwise proceeding with his action in the Supreme Court of the State of New York, County of Kings, entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and bearing Index No. 13922, Year 1957" until the further order of this Court, and directing him to release from

attachment the funds of plaintiff in the First National City Bank, New York, New York.

C. That this Court enter its order restraining and enjoining the defendants, and each of them, their respective agents and attorneys, from instituting or prosecuting any proceeding in any state or United States court affecting said policy No. 1,254,339, or the proceeds thereof, until the further order of this Court.

D. That upon procuring the defendants to interplead herein, the plaintiff be discharged of all further liability with respect to said policy No. 1,254,339 or the proceeds thereof.

E. That plaintiff be awarded a counsel fee and its costs to be taxed.

McCarter, English & Studer
Attorneys for Plaintiff
11 Commerce Street
Newark 2, New Jersey
By: James R. E. Ozias,
A Member of the Firm

Appendix B

Interlocutory Judgment of Interpleader

(Filed—December 9, 1957)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1145-57

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff,

vs.

ALBERT BARNETT KLEPPER, EDWARD SCHNUR, TANNER ASSOCIATES, INC., and MARIE M. CONSTANT,

Defendants.

This matter coming on to be heard on the return of the order to show cause herein dated November 19, 1957, and upon due notice to the defendants, and good cause appearing.

IT IS ORDERED, on this 9th day of December, 1957, on motion of McCarter, English & Studer, attorneys for plaintiff:

1. That the defendants interplead.

2. That the plaintiff be and it hereby is discharged from all further liability with respect to Policy No. 1,254,339, issued by plaintiff under date of July 22, 1953 on the life of Menander T. Constant, as insured, or the proceeds thereof.

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3. That defendant Albert Barnett Klepper, his agents and attorneys, be and they hereby are permanently enjoined and restrained from prosecuting the action now pending against plaintiff in the Supreme Court of the State of New York, County of Kings, which action is entitled "Albert Barnett Klepper, Plaintiff against The Manufacturers Life Insurance Company, Defendant" and which bears index No. 13922, Year 1957.

4. That defendants Albert Barnett Klepper, Edward Schnur, Tanner Associates, Inc., and Marie M. Constant, and each of them, their officers, agents and attorneys, be and they hereby are permanently enjoined and restrained from instituting or prosecuting any proceeding in any state or United States court affecting said Policy No. 1,254,339 or the proceeds thereof.

5. That plaintiff be allowed a counsel fee of Five Hundred Dollars to be taxed out of the fund in court, and that the Clerk of this Court be and he hereby is directed to pay said counsel fee out of the funds deposited in the registry of this Court to the plaintiff's attorneys, McCarter, English & Studer.

WORTENDYKE
U.S.D.J.